SUPREME COURT, U. S.

IN THE

Supreme Court

OF THE

United States

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OCTOBER TERM, [redacted] 1970

No. [redacted] 5317 Misc.

WINSTON BRYANT MCCONNEY,
Petitioner,

vs.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, and JUDGE HARRY PREGERSON, (Sitting by Designation),
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

No. [redacted] 201

WINSTON BRYANT MCCONNEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (DOCKET No. CR 22722)

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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. , Misc.

WINSTON BRYANT MCCONNEY,

Petitioner,

vs.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, and JUDGE HARRY PREGERSON, (Sitting by Designation),

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

Petitioner, Winston Bryant McConney, moves this Court for leave to file the petition for a writ of mandamus hereto annexed, but if not mandamus, moves this Court for a writ of certiorari on separate petition hereto annexed and filed contemporaneously herewith and further moves that an order and rule be entered and issued directing the Honorable United States Court of Appeals for the Ninth Circuit, the Honorable Oliver D. Hamlin, Jr., Judge of the United States Court of Appeals for the Ninth Circuit, the Honorable James R. Browning, Judge of the United

States Court of Appeals for the Ninth Circuit, the Honorable Henry Pregerson, United States District Judge, Central District of California, sitting by designation in the Appeal herein on the United States Court of Appeals for the Ninth Circuit, and the other judges and officers of the United States Court of Appeals for the Ninth Circuit to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Said petitions for a writ of mandamus, but if not mandamus, then certiorari are presented together because they arise, in part, out of identical facts, namely: the failure of the Court of Appeals in affirming the decision below, to accurately state the facts as appearing in the certified record.

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Counsel for Petitioner

MURRAY B. PETERSEN, ESQ.
Co-counsel for Petitioner

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. , Misc.

WINSTON BRYANT MCCONNEY,

Petitioner,

VS.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, and JUDGE HARRY PREGERSON, (Sitting by Designation),

Respondents.

PETITION FOR A WRIT OF MANDAMUS TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLE OLIVER D. HAMLIN, JR., JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLE JAMES R. BROWNING, JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLE HARRY PREGERSON, UNITED STATES DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA, SITTING BY DESIGNATION IN THE NINTH CIRCUIT, AND THE OTHER JUDGES AND OFFICERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Winston Bryant McConney, respectfully petitions this Court to issue a Writ of Man-

damus against the Honorable United States Court of Appeals for the Ninth Circuit, the Honorable Oliver D. Hamlin, Jr., Judge of the United States Court of Appeals for the Ninth Circuit, the Honorable James R. Browning, Judge of the United States Court of Appeals for the Ninth Circuit, the Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation in the Appeal herein on the United States Court of Appeals for the Ninth Circuit, and the other judges and officers of the United States Court of Appeals for the Ninth Circuit, and respectfully represents:

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix B hereto, *infra*, p. 35.

JURISDICTION

Jurisdiction of the United States District Court for the Northern District of California was invoked under the provisions of 18 U.S.C. § 3231 and judgment entered on November 15, 1967.

Petitioner's timely motion for new trial was denied and entered on November 14, 1967. Petitioner gave timely notice of appeal the same day.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was established under 28 U.S.C. § 2106 and 28 U.S.C. § 1291, and the decision of the United States Court of Appeals for the

Ninth Circuit affirming the judgment of the District Court was made and entered 30 December, 1969. Petitioner's timely petition for rehearing was denied on April 2, 1970.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1651(a), and the order of Justice William O. Douglas of 12 May, 1970 granting an extension of time within which to file this petition pursuant to Supreme Court Rules 22 and 34.

QUESTIONS PRESENTED

I.

Did the failure of the Court of Appeals to accurately state the facts of the case as they appear in the Certified Record on Appeal deny petitioner due process of law by depriving him of a fair and just basis of appeal?

II.

Did the Court of Appeals, in failing to accurately state the facts as they appear in the Certified Record and in refusing to correct the error by denying petitioner's timely petition for rehearing, deny the petitioner a fair and adequate appeal?

STATUTES INVOLVED

The statutory provisions involved are *United States Constitution*, Amendment 5; 18 *United States Code* § 3149 and § 3150; 18 *United States Code Federal*

Rules of Criminal Procedure 46(b), and 28 *United States Code Federal Rules of Appellate Procedure* 40(a). They are printed in Appendix J, p. 59.

STATEMENT OF THE CASE

On November 16, 1966, petitioner was indicted on a single count of violation of 26 U.S.C. § 4705(a), (Unlawful Sale of Narcotic Drugs). The basis for federal jurisdiction was 18 U.S.C. § 3231 (federal law violation.) The petitioner was arrested on January 23, 1967. Petitioner's jury trial was set for July 24, 1967. A defense witness, Jesse Coy, a government informer, refused to accept a subpoena to testify which had been executed by David P. Bancroft, the prosecuting Assistant United States Attorney (App. D) p. 45. Upon request of defense counsel, the defense witness was arrested on a warrant (App. F) p. 49, pursuant to a complaint executed by the prosecuting Assistant United States Attorney (App. E) p. 47. He was brought before the United States Commissioner and released on his own recognizance on condition that he appear once daily before local police from July 24, 1967 until trial (App. G) p. 51. The trial commenced on July 24, 1967 with the witness present in court. A mistrial was declared the following day due to juror disability. The defense witness was called to the bench and admonished to remain ready to testify and subject to the direction of the prosecuting Assistant United States Attorney, who agreed to notify the defense witness of the next trial date (App. H) p. 53. The case was

next set for trial on October 9, 1967. A continuance was ordered to October 16, 1967, and then to October 23, 1967, on whose motion and for what purpose does not appear of record. On this last date petitioner's second trial commenced and petitioner moved for a continuance (RT 2:14-18)* properly supported by affidavit and authorities (RT 2:18-21) for the purpose of obtaining the presence of the absent defense witness. The prosecuting Assistant United States Attorney successfully resisted the motion (RT 3:24-25) and the trial commenced without the presence of the defense witness. During the trial no evidence was introduced of any search by the prosecution for the absent witness nor any attempt made to inform the defendant or his counsel of the loss of contact with the absent witness. During the course of the trial, the implication of petitioner in the transaction was by hearsay testimony purportedly the statement of Jesse Coy, the absent witness (RT 66:1-7). At the close of the trial a particularly lengthy series of hearsay statements were made in full to the jury (RT 207:1 to RT 212:3) before the Court acceded to the defense's timely objections (RT 208:1 and 209:20-21), and request for admonition. These statements also were those of the absent witness. The cautionary instruction was given (RT 211:18-23), but not explained until after the Court was well within the general instructions as to all testimony (RT 218: 23-24). Petitioner was found guilty and sentenced to the minimum term and fine

* Reporter's Transcript.

for the violation of said statute (App. A) p. 33. Petitioner filed his motion for a new trial on October 30, 1967, which was denied on November 14, 1967. Petitioner filed his notice of appeal the same day.

On December 30, 1969, petitioner's conviction was affirmed by the United States Court of Appeals for the Ninth Circuit, which decision contained erroneous statements that the absent witness, Jesse Coy, had been released on bail after his arrest and after the mistrial of July 25, 1967 (App. B) p. 35. This certified record shows the absent witness to have been released on his own recognizance (App. G, H and D) pp. 50, 53, and 45. A timely petition for rehearing to correct the error was denied on April 2, 1970 (App. C) p. 43. Petitioner has been at liberty on bond, and the United States Court of Appeals for the Ninth Circuit has stayed the mandate of its decision until June 10, 1970, or until final disposition of this court to allow petitioner to apply to this Court for writs of mandamus and/or certiorari.

MANDAMUS

Reasons for Granting the Writ

I.

The Failure of the Court of Appeals to Accurately State the Facts of the Case as They Appear in the Certified Record on Appeal Denies Petitioner Due Process of Law by Depriving Him of a Fair and Just Basis of Appeal to This Court.

The failure of the Court of Appeals to accurately state in its decision the facts as they appear in the

certified record on appeal by assuming and stating that the material defense witness was released on bail instead of on his own recognizance deprives petitioner of a fair and just basis of appeal to this Court. Petitioner is entitled to a review on the true facts. However nothing but what constitutes the record of the Court below can be sent up to the Supreme Court, *Davis* v. *Packard*, 31 U.S. 41, 8 L. Ed. 312. An order made under a total misapprehension of fact is correctable by mandamus, *Ex Parte Roberts*, 82 U.S. 384, 21 L. Ed. 131 (1872). Mandamus is "an established remedy to oblige inferior Courts and magistrates to do that justice which they are in duty and by the virtue of their office bound to do." *Commonwealth of Virginia* v. *Rines*, 100 U.S. 313, 25 L. Ed. 667. The U.S. Court of Appeals refused to correct its mistatement of the facts even after its error was properly and timely brought to its attention by petitioner's petition for rehearing. By its denial of the petition for rehearing, the Court of Appeals caused the exhaustion of all petitioner's remedies except those available from the Supreme Court. If other remedies are exhausted such mistake of fact is appropriately remedied by this Court's issuance of a writ of mandamus. *Ex Parte Riddle*, 255 U.S. 450, 41 S. Ct. 370, 65 L. Ed. 725 (1921), *State Ex rel. Riggs* v. *Vigo Circuit Court*, 236 Ind. 587, 142 N. E. 2d 214 (1957). The decision of the United States Court of Appeals for the Ninth Circuit will be used as the basis of consideration by the Supreme Court and unless corrected will

contain substantial and prejudicial misstatements of the facts of the case. Unless this court's discretion is exercised to insure that a full and correct record is before it, the appellate powers of this court will be unconscionably defeated. *United States* v. *Booth*, 59 U.S. 476, 15 L. Ed. 464 (1855); *United States* v. *Gomez*, 70 U.S. 752, 18 L. Ed. 212 (1865), "where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." *Ex Parte United States*, 287 U.S. 241, 53 S. Ct. 129, 77 L. Ed. 283 (1932). Traditionally, this court will not go outside the record on appeal; *Hughes* v. *Wendel*, 317 U.S. 134, 63 S. Ct. 103, 87 L. Ed. 139 (1942). It therefore follows that the issuance of a writ of mandamus to provide petitioner with a fair and just basis for appeal by correcting the record below is sanctioned by the established customs and usages of this court and thereby becomes a necessary element of petitioner's right of procedural due process under the Fifth Amendment of the Constitution of the United States. *Ex Parte Wall*, 107 U.S. 265 (1883).

II.

The Failure of the Court of Appeals to Accurately State the Facts as They Appear in the Certified Record on Appeal and Considered by It in Reaching Its Decision Below Denied Petitioner a Fair and Just Review by the Court of Appeals Which May Now Be Corrected Only by the Issuance of a Writ of Mandamus or Certiorari From This Court.

In considering the misstatement of fact in reaching its decision, the Court of Appeals clearly stepped outside of the record. Matters which do not appear in the record may not be considered on appeal. *Hofman* v. *Halden*, (9th Cir. 1959) 268 F. 2d 280; *Duran* v. *United States*, (9th Cir. 1969) 413 F. 2d 596. Whether the material defense witness was entitled to be released on his own recognizance under *18 U.S.C. § 3149*, *§ 3150* and *18 U.S.C. Federal Rules of Criminal Procedure, 46(b)* is a highly doubtful proposition under the facts of this case. Under any view as to the validity of the release of the material defense witness on his own recognizance, it is clear that the Court of Appeals considered the mistake of fact as to the economic compulsion of the material defense witness to appear at trial to be part of the *ratio decidendi*. Therefore, if the correct facts had been considered, a different decision would likely have been reached. *National Labor Relations Board* v. *Brown & Root, Inc.*, (8th Cir. 1953) 206 F.2d 73; *Forester* v. *Johnson*, 126 Kansas 590; 270 Pac. 602 (1928). Petitioner made proper and timely application by petition for rehearing which sought correction of facts overlooked and misapprehended in its decision, *28 U.S.C. Federal Rules*

of Appellate Procedure 40(a). The Court of Appeals abused its discretion in denying petitioner's petition for rehearing. Upon such denial, relief from such extraordinary prejudice to petitioner is unavailable except by petition to this court. This court should issue the petitioned for writ.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of mandamus issue out of this Honorable Court directing and commanding the Honorable United States Court of Appeals for the Ninth Circuit, the Honorable Oliver D. Hamlin, Jr., Judge of the United States Court of Appeals for the Ninth Circuit, the Honorable James R. Browning, Judge of the United States Court of Appeals for the Ninth Circuit, the Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation in the Appeal herein on the United States Court of Appeals for the Ninth Circuit, and the other judges and officers of the United States Court of Appeals for the Ninth Circuit to:

1. delete and expunge the following erroneous recitation appearing in the sixth to tenth lines of the first paragraph of the third page of their printed opinion:

> ". . . Coy was arrested on a warrant and released on bail. He appeared in court on July 24. Following the declaration of mistrial the court continued Coy on bail and directed him to ap-

> pear at the time the case was next set for trial . . ."

and to substitute therefor the following corrected statement:

> ". . . Coy was arrested on a warrant and released on his own recognizance. He appeared in court on July 24. Following the declaration of mistrial the court continued Coy on his own recognizance, ordering him to remain subject to the instructions of the prosecuting Assistant United States Attorney . . ."

2. rehear petitioner's appeal in the light of said correction; and

3. grant such other and further relief as may be just and meet in the premises.

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Co-counsel for Petitioner

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No.

WINSTON BRYANT MCCONNEY,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Winston Bryant McConney respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 30, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix B hereto, *infra* p. 35.

JURISDICTION

Jurisdiction of the United States District Court for the Northern District of California was invoked under the provisions of 18 U.S.C. § 3231 and judgment entered on November 15, 1967.

Petitioner's timely motion for new trial was denied and entered on November 14, 1967. Petitioner gave timely notice of appeal the same day.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit was established under 28 U.S.C. § 2106 and 28 U.S.C. § 1291, and the decision of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the District Court was made and entered 30 December, 1969. Petitioner's timely petition for rehearing was denied on April 2, 1970.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1) and the order of Justice William O. Douglas of 12 May, 1970 granting an extension of time within which to file this petition pursuant to Supreme Court Rules 22 and 34.

QUESTIONS PRESENTED

I.

Whether the failure of the Court of Appeals to accurately state the facts as they appeared in its cer-

tified record has deprived petitioner of a fair and just appeal in view of the probability that, had the facts been stated correctly, the decision of the Court of Appeals would have been different, and, further, whether this same failure of the Court of Appeals to accurately state the facts and the inclusion of the erroneous statements within its decision deprived petitioner of a fair and just review in the Supreme Court.

II.

Whether the Court of Appeals committed error in denying petitioner's motion for a continuance to obtain the presence at trial of a Government informer and material defense witness under the particular facts of this case.

III.

In view of the unresolved question as to the constitutionality of the admission of an out of court declaration by an alleged co-conspirator as an exception to the hearsay rule under the confrontation clause of the Sixth Amendment, did the court below commit plain error in admitting objectionable and prejudicial hearsay testimony and in striking highly prejudicial hearsay testimony with an indecisive admonition instead of granting a mistrial, and thereby violate traditional legal principles protecting the right to the confrontation of witnesses and procedural due process, in the light of the interrelationship of the hearsay testimony with the absent material defense witness.

STATUTES INVOLVED

The statutory provisions involved are *United States Constitution*, Amendments 5 and 6; 18 *United States Code Federal Rules of Criminal Procedure* 52(b). They are printed in Appendix J, *infra*, p. 59.

STATEMENT OF THE CASE

(See Statement of Case for Mandamus, p. 6.)

CERTIORARI

REASONS FOR GRANTING THE WRIT

I.

The Failure of the Court of Appeals to Accurately State the Facts as They Appear in the Certified Record on Appeal and Considered by It in Reaching Its Decision Below Deprived Petitioner of a Fair and Adequate Appeal and Thereby Materially Prejudiced Petitioner in the Court of Appeals and in This Court and, If This Court Decides Not to Issue a Writ of Mandamus, Then This Court Should Consider This Material Prejudice by the Issuance of a Writ of Certiorari to Review the Entire Record So as to Promote the Administration of Justice by the Exercise of Its Inherent Power of Supervision Over the Court of Appeals and to Insure Petitioner a Fair and Just Review.

Where, as here, there is a misstatement of fact, a writ of certiorari should be granted to review procedural questions involved in an incorrect statement contained in the certified record on appeal and, if necessary, the matter should be remanded for further proceedings in conformity with a corrected record. *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372, 48 S. Ct. 183, 72 L. Ed. 318 (1928). This court holds

such power to issue a writ of certiorari for the purpose of promoting the administration of justice, *Lamb* v. *Cramer*, 285 U. S. 217, 52 S. Ct. 315, 76 L. Ed. 715 (1932). Reasons for granting a writ of mandamus to insure a fair and just review by the Court of Appeals argued on pp. 8-12, supra, are clearly equally compelling in support of the remedy of certiorari and therefore the entire argument in re mandamus is hereby referred to and incorporated herein as if fully set forth at this point and thereby made a part hereof. From the foregoing it is clear that this Court should grant a writ of certiorari to review the proceedings below on the basis of the true statement of the facts.

II.

The Decision of the Court of Appeals Below on the Significant and Recurring Question as to the Duty of the Prosecution to Obtain the Attendance at Trial of a Government Informer and Material Defense Witness Is in Conflict With the Controlling Precedents in the Ninth Circuit and in Other Circuits but Is Supported by Decisions of Still Other Circuits; Under Any View of Such Prosecution Duty, It Was a Grave Miscarriage of Justice to Not Allow a Continuance to Obtain the Presence at Trial of the Material Defense Witness Under the Particular Facts of This Case.

A. There is an unresolved conflict between the Courts of Appeals of the various circuits as to whether the prosecution's duty is limited to informing the defense of the name and address of a government informer and material defense witness and to cooperate in defense efforts to obtain the presence of such witness or whether it extends to the further duty to make a

good faith effort and diligent search to obtain the presence of such witness. This court held in *Roviaro* v. *United States*, 353 U.S. 53, 77 S. Ct. 623, I L. Ed. 2d 639 (1957), that the government's privilege to withhold disclosure of the name and address of its informers and employees must give way where disclsoure would be relevant and helpful to the accused's defense. *Roviaro* v. *U. S. supra*, has been the subject of much appellate litigation as a result of its further holding that disclosure should be required depending on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Such appellate litigation becomes particularly significant in relation to this Court's decisions in *Smith* v. *Illinois*, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1967) and *Barber* v. *Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) applying the Confrontation Clause of the Sixth Amendment to the United States Constitution. In *Smith* v. *Illinois*, *supra*, this court held that the defendant was denied his right to confrontation where the trial court sustained an objection to defense questioning seeking the correct name and address of the government informer and prosecution witness. In *Barber* v. *Page*, *supra*, this court held that the right to confrontation requires the prosecution to make a good faith effort to obtain the attendance at trial of a co-defendant who had given testimony incriminating the defendant at a prior trial. In spite of the obvious impact of *Smith* v. *Illinois*, *supra*, and

Barber v. *Page*, *supra*, on the present question, the Seventh and Second Circuit Courts of Appeals have, as a matter of law, continued to limit the prosecution's duty to informing the defense of the name and address of the government informer and cooperating in defense attempts to obtain the presence of the witness at trial. *United States* v. *Sosa*, (7th Cir. 1967), 379 F. 2d 525, cert. den. 389 U.S. 845; 88 S. Ct. 94, 19 L. Ed. 2d 111; *United States* v. *Pruitt*, (7th Cir. 1964) 331 F. 2d 232, cert. den. 379 U.S. 884, 85 S. Ct. 152, 13 L. Ed. 2d 90; *United States* v. *D'Angiolillo*, (2nd Cir., 1965) 340 F. 2d 453, cert. den. 380 U.S. 955, 85 S. Ct. 1090, 13 L. Ed. 2d 972; *United States* v. *Cimino*, (2nd Cir., 1963) 321 F. 2d 509, cert. den. 375 U.S. 967, 84 S. Ct. 486, 11 L. Ed 2d 416 (but see dissent of Waterman, C. J., at p. 513).

Directly in conflict with these decisions are the decisions of the Ninth and Eight Circuit Courts of Appeal holding under *Roviaro* v. *United States*, *supra*, that where certain conditions are met the prosecution has not only the duty of disclosure and cooperation, but has the further duty to make a good faith attempt to obtain the presence of the witness at trial. *Velarde-Villarreal* v. *United States*, (9th Cir., 1965) 354 F. 2d 9; *Tapia-Corona* v. *United States*, (9th Cir., 1966) 369 F. 2d 366; *White* v. *United States* (8th Cir., 1964) 330 F. 2d 811, cert. den. 379 U.S. 855, 85 S. Ct. 105, 13 L. Ed. 2d 58; see also *United States* v. *Clarke*, 220 F. Supp. 905 (1963). Thus, the decision in this case falls squarely within a developing conflict among the

circuits over what has become a most troublesome federal question in the administration of justice and is thereby deserving of review by this court by issuance of a writ of certiorari, *Linkletter* v. *Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2nd 601 (1965). *Fields* v. *United States*, 205 U.S. 292, 27 S. Ct. 543, 51 L. Ed. 807 (1907).

B. It was a grave miscarriage of justice to deny a continuance to obtain the presence at trial of the material defense witness under the particular facts of this case. In this instant case the absent defense witness was a government employee and petitioner had exhausted all means within his control to secure the attendance of the witness. Although the trial court had expressly selected the prosecution as the party responsible for maintaining contact with the witness, nowhere does it appear that the prosecution ever informed the defense of its claimed inability to find the witness prior to the opening of the trial. The prosecution improperly opposed the defense request for a continuance to find the witness, although there is no evidence or finding of any search on the part of the prosecution for the witness, despite the good faith duty to do so. *Roviaro* v. *U.S.*, *supra*, *Velarde-Villearreal*, *supra*, *United States* v. *Collier*, (7th Cir., 1963) 313 F. 2d 157, cert. den. 374 U.S. 844, 83 S. Ct. 1900; 10 L. Ed. 2d 1064, *United States* v. *Clarke*, *supra*, and *Eleazer* v. *Superior Court*, 1 C. 3d 836, 83 Cal. Rptr. 586 (1970).

III.

The Decision of the Court of Appeals Below Approving of the Admission of an Out of Court Declaration by an Alleged Co-Conspirator as an Exception to the Hearsay Rule Is Based on the Unresolved Question as to the Constitutionality of This Exception Under the Confrontation Clause, Which Question Is Presently Before This Court in Substantially Identical Form; In Any Event, the Court Below Erred in Admitting Objectionable and Prejudicial Hearsay Testimony and Further Erred in Striking Highly Prejudicial Hearsay Testimony With an Indecisive Admonition Instead of Granting a Mistrial and Thereby Violated Traditional Legal Principles Protecting the Right to the Confrontation of Witnesses and Procedural Due Process, All of Which Resulted in a Grave Miscarriage of Justice in the Light of the Interrelationship of the Hearsay Testimony With the Absent Material Defense Witness.

1. There is an unresolved question presently before this court as to whether the exception to the hearsay rule for declarations by an alleged co-conspirator made in furtherance of the conspiracy is violative of the Confrontation Clause which is substantially identical to the issue resolved in favor of the respondent by the court of appeals and which should be given further review by this court.

The decision of this court in *Delaney* v. *United States*, 263 U.S. 586, 44 S. Ct. 206, 68 L. Ed. 462 (1924), rejecting the contention that the right of confrontation was violated by the receipt of testimony regarding out-of-court declarations apparently made in furtherance of a conspiracy has become unsettled and doubt has been cast on its continuing validity by this court's decisions in *Pointer* v. *Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), *Bruton*

v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Barber* v. *Page*, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968). In *Bruton*, *supra*, this court held that the out-of-court declaration of an alleged co-conspirator is inadmissible even if a cautionary instruction is given as a result of the Confrontation Clause of the Sixth Amendment to the United States Constitution. In so holding, this court expressly noted that no recognized exception to the hearsay rule was before it and therefore no view was expressed as to whether such exceptions raised questions under the Confrontation Clause. In *Barber*, *supra*, this court held that the prosecution was under a duty to make a good faith effort to obtain the presence at trial of an absent co-defendant who had given testimony incriminating defendant at a prior trial as a result of the Confrontation Clause. Unlike *Bruton*, *supra*, in so holding this court expressly struck down the previously valid hearsay exception for recorded testimony given at a prior trial where the declarant was presently unavailable on the grounds that this exception no longer had any independent rationality in light of the cooperation between the various States and the Federal Government in obtaining the presence of material witnesses at trial. The rationale of the decision in *Barber*, *supra*, is clear: that any exception to the hearsay rule is sufficient under the Confrontation Clause only when there are salient and cogent reasons for disregarding the defendant's right to confront the witnesses against him. In *Evans* v. *Dutton*, (5th Cir. 1968) 400 F. 2d 826, prob. juris.

noted 393 U.S. 1076, 89 S. Ct. 862, 21 L. Ed. 2d 770, the Court of Appeals held that in light of *Barber*, *supra*, Georgia's co-conspirator statute admitting declarations of a co-conspirator made after the actual commission of the crime was violative of the Confrontation Clause in that there was no independent rationale or adequate substitute for the cross-examination of witnesses. While *Evans*, *supra*, is limited to its facts, there can be no sound distinction between the facts there and here. Clearly, there is no rational substitute for the right of confrontation regardless of whether the hearsay declaration is made during or subsequent to the criminal act. This court has noted that there are many logical and practical reasons to be advanced against the hearsay exception for declarations of a co-conspirator and there are absolutely no reasons inherent in such an exception that protect the defendant's right to confront the witnesses against him. *Krulewitch* v. *United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949). In light of this court noting of probable jurisdiction in *Evans*, *supra*, and the unsettled and questionable validity of the conspiracy exception to the hearsay rule, this court should either grant this petition to review this unresolved constitutional question or postpone consideration of this petition until such question has been resolved in *Evans*, *supra*.

2. Petitioner was materially prejudiced and subjected to a grave miscarriage of justice by the admission of an out-of-court declaration of a co-defendant

in that said declaration was a substantial part of the evidence incriminating petitioner and is clearly inadmissible under the co-conspirator, adoptive admission, or agency exceptions to the hearsay rule.

The trial court admitted the declaration of the out-of-court co-defendant directed towards petitioner that "We are ready. Get the money." on the grounds that it was an adoptive admission or made by an agent. The Court of Appeals affirmed on the grounds that it was made in furtherance of a conspiracy. All grounds for admission are clearly erroneous. For this otherwise objectionable statement to be admissible as that of a co-conspirator, it must be made under circumstances which constitute independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant with it. *Carbo* v. *United States* (9th Cir. 1963) 314 F. 2d 718, cited with approval by the court below on p. 4 of its printed decision. Such independent proof must be sufficient to establish a *prima facie* case of conspiracy. *Bannon* v. *United States*, 156 U.S. 464, 15 S. Ct. 467, 39 L. Ed. 494 (1895); *United States* v. *Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948), and *Glasser* v. *United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). In light of the facts before him, the trial judge clearly abused his discretion in holding that there was enough independent evidence to establish the alleged conspiracy, if the jury should believe the independent evidence. *Carbo, supra; White* v. *United States* (8th Cir. 1964) 330 F. 2d 811. No jury

could find a conspiracy even if the evidence was most favorably construed for the prosecution in the present case, viz., that petitioner was present in the apartment and indicated the direction of what subsequently turned out to be contraband. *Murray* v. *United States*, (9th Cir. 1968), 403 F. 2d 694; *Chavez* v. *United States*, (9th Cir. 1960) 275 F. 2d 813. Further, this declaration could not be admitted as an adoptive admission on the part of petitioner. The prosecution failed to meet its burden of proof that petitioner adopted the declaration by remaining silent in that (a) there are interpretations other than guilt equally consistent with petitioner's silence, *Sandez* v. *United States*, (9th Cir. 1956) 239 F. 2d 239, *Kelly* v. *United States*, (D.C. Cir. 1956) 236 F. 2d 746; and (b) there is insufficient proof that petitioner heard the above declaration, *Arpan* v. *United States*, (8th Cir. 1958) 260 F. 2d 649, *Hauger* v. *United States*, (4th Cir. 1909) 173 F. 54. Finally, this decision could not be admitted as made by an agent as there is no evidence that the declarant was authorized by petitioner to make such declarations. *Flintkote Co.* v. *Lysfjord*, (9th Cir. 1955) 246 F. 2d 368, cert. den. 355 U.S. 835, 78 S. Ct. 54, 2 L. Ed. 2d 46.

3. The admission of a whole line of a witness's highly prejudicial hearsay testimony subject to a belated striking of that testimony and the giving of an admonitory warning is clear error.

The trial court committed clear error in permitting highly prejudicial testimony by a narcotics agent as

to petitioner's role in obtaining a tape recording of an absent material defense witness to run for nearly four pages of the Reporter's Transcript over defense counsel's prompt and repeated objection before belatedly striking all but the last question and answer. At that time, the trial judge failed to inform the jury what was meant by "striking" and the effect of the ruling was only mentioned as part of an admonitory warning at the time of the General Instructions to the jury. Such ineffective efforts to "unring the bell" after the admission of highly prejudicial hearsay testimony are violative of the Confrontation Clause under *Bruton* v. *United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *Marshall* v. *United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959); *Lawrence* v. *United States*, (10th Cir. 1966) 357 F. 2d 434; *Courtney* v. *United States* (9th Cir 1968) 390 F. 2d 521; *United States* v. *Smith*, (6th Cir. 1968) 403 F. 2d 74.

4. The prejudice of the above hearsay testimony, while a sufficient basis in itself for the issuance of a writ of certiorari, is particularly detrimental to the rights of petitioner in light of its interrelationship with the absence of the material defense witness and the combination thereof clearly sufficed to deny petitioner a fair trial.

The interrelationship of the admission of the objectionable and prejudicial out-of-court declarations and the error of the trial court in refusing to grant a continuance to obtain the presence of the declarant wit-

ness is clear. Had the witness been present in court, the objectionable hearsay would have formed no part of the trial. Considering the failure of the prosecution to make any effort to obtain the presence of the witness despite the fact that he was placed in its custody and was its employee, and further considering its tenuous argument against granting a continuance to obtain the presence of said witness in light of the admission of the prejudicial hearsay, there can be no doubt that, notwithstanding the importance of the separate error, the combination thereof so prejudiced petitioner that this court should take notice of clear error under 18 U.S.C. Federal Rules of Criminal Procedure 52(b).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

MARKELL BAER, ESQ.
Counsel for Petitioner

MURRAY B. PETERSEN, ESQ.
Co-counsel for Petitioner

PROOF OF SERVICE

I, Murray B. Petersen, co-counsel for petitioner in this Petition for Mandamus and/or Certiorari and counsel of record for petitioner in the United States Court of Appeals for the Ninth Circuit, and a member of the Bar of the Supreme Court of the State of California and of the United States Court of Appeals for the Ninth Circuit, hereby certify that I served two copies of the foregoing "Motion and Petition for Mandamus and/or Certiorari" on each of the following named individuals by depositing the same in a United States mail box, with first class postage prepaid, this 29th day of May, 1970, at Oakland, California, addressed as follows:

HON. ERWIN GRISWOLD
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

HON. OLIVER D. HAMLIN, JR.
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

HON. JAMES R. BROWNING
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

HON. HARRY PREGERSON
United States District Judge, Central District of California (sitting by designation), by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

JUDGES AND OFFICERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, by mailing 10 copies addressed to William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

JAMES L. BROWNING
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

MURRAY B. PETERSEN
Co-Counsel for Petitioner,
WINSTON BRYANT MCCONNEY

Subscribed and sworn to before me a Notary Public in and for the State of California, County of Alameda, this 29th day of May, 1970.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA vs. WINSTON BRYANT MCCONNEY	No. 41110

On this 14th day of November, 1967 came the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation: Title 26 U.S.C. Section 4705(a)—Unlawful Sale of Narcotic Drug —Heroin. (On or about October 14, 1966, in the City of Berkeley, County of Alameda, State and Northern District of California, defendant did unlawfully sell approximately 9.305 grams of heroin). as charged in count 1 of indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years and fined the sum of One Dollar ($1.00).

(Defendant not named in counts 2 and 3 of indictment).

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:
Judgment and Commitment and Fine Filed this 14th day of November, 1967.

ALFONSO J. ZIRPOLI,
United States District Judge.

By JAMES P. WELSH, *Clerk.*

Entered in Criminal Docket Nov. 15, 1967.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WINSTON BRYANT MCCONNEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22722

Appeal from the United States District Court for the Northern District of California.

Before: HAMLIN and BROWNING, Circuit Judges, and PREGERSON, District Judge*

HAMLIN, Circuit Judge

In the first count of an indictment filed in the United States District Court for the Northern District of California, Winston B. McConney, appellant herein, was charged along with one Paul L. McAlee with a violation on October 14, 1966, of 26 U.S.C. §4705(a) (transfer of heroin not in pursuance of a written order).[1] In Counts Two and Three of the indictment McAlee alone was charged with two

[1]"It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

narcotic offenses alleged to have occurred on October 19, 1966. McAlee was tried separately and was found guilty on all three counts. Thereafter, McConney, who had been a fugitive, was arrested and brought to trial on Count One. Appellant's first jury trial commenced on July 24, 1967. A mistrial was declared the following day due to a juror disability. On July 26 appellant's trial was set for October 9, 1967. It was continued to October 16, and on that day was again continued to October 23, when his second jury trial commenced. Appellant was convicted and he has taken a timely appeal to this court which has jurisdiction under 28 U.S.C. §1291.

Appellant's specifications of error may be summarized as follows: (1) That the district court erred in not granting appellant's motion for a continuance in order to endeavor to obtain the presence of an alleged material witness; (2) that the district court committed prejudicial error in unduly asking questions of the witnesses during the trial; (3) that certain hearsay testimony was improperly admitted over defense objection; and (4) that compliance with 26 U.S.C. §4705(a) requires an individual to incriminate himself in violation of the Fifth Amendment.

At the trial the evidence introduced by the prosecution generally developed the following facts. On October 14, 1966, Steve Chesley, an agent of the Federal Bureau of Narcotics, and Jesse Coy, a longtime informant of the Bureau, were in the living

room of an apartment in Berkeley. McAlee came to the door of the room from the adjoining hall and said, "We are ready, get the money." At that time Chesley gave Coy $450 of official advance funds and Chesley and Coy followed McAlee across the hall to the open door of a bathroom. Chesley testified that McAlee's statement was made in a tone of voice loud enough for Chesley to hear it some 15 to 20 feet away. Chesley further testified that when he was at the door of the bathroom he could see McAlee and appellant inside. At this point appellant said, "There it is," indicating a powdery substance on a chair in the bathroom. Coy said, "Where?" and McAlee replied, "Right there." Coy started to hand the money to McAlee, but appellant grabbed the money out of his hands. Appellant counted the bills, Coy took the powdery substance (later determined to be heroin), and appellant and McAlee left after appellant stated in response to a question by Coy as to whether he wanted to meet his partner, "No, not right now, Man, later."

At McAlee's separate trial in January, 1967, Coy was a witness and corroborated agent Chesley's story. Nevertheless, a few days before the July 24 trial date appellant's counsel attempted to subpoena Coy as a witness. The latter refused to accept the subpoena and when appellant's counsel notified government counsel of this fact, by mutual agreement Coy was arrested on a warrant and relased on bail. He appeared in court on July 24. Following the declara-

tion of mistrial the court continued Coy on bail and directed him to appear at the time the case was next set for trial. On October 2, 1967, Coy was advised that the trial date was October 9. He stated that he would present himself a that time. He failed to appear on October 9 and a warrant for his arrest was issued. The case was then continued to October 16 and on that date continued again to October 23. On this latter date appellant's counsel requested another continuance on the groud that Coy still could not be found. Appellant's counsel at that time had no information to give the court as to where or when Coy could be found.

The granting of a continuance is within the discretionary powers of the trial judge. The exercise of this discretition will not be disturbed on appeal unless there is an abuse of that discretion. *Lemons* v. *United States*, 337 F.2d 619 (9th Cir. 1964), cert. denied 380 U.S. 946 (1965). We see no abuse of discretion on the denial of a continuance in the circumstances of this case. It had already been more than a year since the indictment of appellant; two continuances had already been had; there appeared to be no assurance that a continuance would result in the production of the missing witness; and the court agreed to admit in evidence a tape recorded statement of the missing witness for purposes of impeachment of Chesley's testimony with regard to appellant's having been in the bathroom at the time of the transaction in question.

Appellant's second specification of error requires little discussion. We have examined the record and find that the actions of the trial judge in asking questions of witnesses, including appellant, were not improper. He had the right and the duty to ask clarifying questions and in doing so nothing that he did was prejudicial to the appellant in any way. The record does not disclose that appellant's counsel interposed any objections to the court's questions, nor does it appear how and in what manner appellant suffered any prejudice by the court's actions. We see no merit in this contention.

Appellant next contends that the trial judge committed error in allowing into evidence certain hearsay evidence to which objections were appropriately lodged. He first objects to the admission of the statement of McAlee to Coy and Chesley, "We are ready, get the money," which was testified to by agent Chesley. We have outlined above the circumstances in which that statement was made, and the events which immediately followed that statement. The district judge overruled counsel's objection and admitted the statement, saying "Counsel has now established enough consort of action to justify its admission, aside from the question of the distances, the tone of voice and the volume of voice." We agree that this hearsay testimony was properly admitted in evidence. See *Carbo* v. *United States*, 314 F.2d 718 (9th Cir. 1963), cert. denied 377 U.S. 953 (1964).

Appellant's counsel represented to the court that

in March, 1967, Coy had, in an interview in appellant's counsel's office, stated that Chesley was not in the bathroom at the time of the alleged narcotic transaction in question, and that he did not see it. In the discussion of this evidence out of the presence of the jury the court stated that under the circumstances he would permit appellant's counsel to introduce as part of his evidence the tape recording of the interview in which this statement was made, and that he would also allow in evidence any statements made by Coy inconsistent therewith. The trial proceeded and as a part of appellant's case the tape recorded conversation in appellant's counsel's office was admitted in evidence for the purpose of impeaching Chesley's testimony. Counsel for the government then introduced into evidence the prior testimony of Coy at the McAlee trial, in which he stated that Chesley saw appellant in the bathroom. This testimony was allowed into evidence for the limited purpose of impeaching Coy's tape recorded testimony. Agent Chesley was also recalled by the government for purposes of impeachment of Coy's tape recorded statement. He testified as to a statement made by Coy to him subsequent to the taped conversation in which Coy described the circumstances under which the taped statement was made. Upon objection by appellant's counsel that Chesley's testimony as to these details was hearsay, the octur struck most of Chesley's testimony and directed the jury to disregard this portion of Chesley's testimony. The question and answer which the court allowed to remain in

the record was "Q: Did he [Coy] tell you whether or not the statement that he gave to Mr. Wells and to Mr. Chesley[2] was truth? A: He stated he lied." We see no error in the admission of agent Chesley's testimony in this ergard. The hearsay testimony concerning the tape recorded statement had already been admitted on behalf of the defense. While the general rule is that a witness may be impeached by his prior inconsistent statements only after a proper foundation has been laid by inquiring as to whether he made the prior inconsistent statements, that rule has been dispensed with in situations where the witness is unavoidable and hearsay evidence is offered to impeach the previously admitted hearsay evidence of the statements of the absent witness. See *Carver* v. *United States*, 164 U.S. 694 (1897); *People* v. *Collup*, 27 Cal.2d, 829, 167 P.2d 714 (1946). See generally, 3 Wigmore on Evidence §1033 (3rd ed.).

Appellant's contention that compliance with 26 U.S.C. §4705(a) requires the commission of an incriminating act in violation of the Fifth Amendment privilege against self-incrimination has been resolved against appellant in *Minor* v. *United States*, ... U.S. ..... (No. 189, December 8, 1969). We are bound by that decision.

Appellant's conviction for violation of 26 U.S.C. §4705(a) is affirmed.

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[2]Mr. Wells and Mr. Chesney were lawyers representing appellant, and were the persons to whom Coy had made the taped statement.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WINSTON BRYANT MCCONNEY, *Appellant*,	No. CR-22722
UNITED STATES OF AMERICA, *Appellee.*	

ORDER DENYING PETITION FOR REHEARING

Before: HAMLIN and BROWNING, Circuit Judges, and PREGERSON, District Judge*

The petition for rehearing received on February 10, 1970, is denied.

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA vs. WINSTON BRYANT MCCONNEY, et al.	Criminal No. 41110

To Jesse Coy

You are hereby commanded to appear in the United States District Court for the Northern District of California, Courtroom of Master Calendar Judge at 450 Golden Gate Avenue, in the City of San Francisco, on the 24th day of July, 1967, at 9:30 o'clock A.M., to testify in the above-entitled case.

This subpoena is issued on application of the United States.

June 2, 1967.

DAVID P. BANCROFT,
Asst. U.S. Attorney,
450 Golden Gate Avenue,
San Francisco, California
Tel.: 556-4229
Attorney for Plaintiff.

JAMES P. WELSH, *Clerk.*
By ....., *Deputy Clerk.*

Received this subpoena at San Francisco, Calif., on July 20, 1967. I served it on the within named Jesse Coy by delivering a copy to him.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Commissioner's Docket No. 1, Case No. G-13

UNITED STATES OF AMERICA,
vs.
WINSTON BRYANT MCCONNEY
(Jesse Coy, Material Witness)

Complaint for Violation of U.S.C. Title Section Rule 46 b, Federal Rules of Criminal Procedure

Before Richard S. Goldsmith, Commissioner, San Francisco, California.

The undersigned complainant being duly sworn states:

That on or about July 20, 1967, at City of Berkeley, County of Alameda, in the State and Northern District of California, pursuant to its legal obligation to make the Government informant available to the defense for testimony at trial, the United States, by Agent David Wood of the Federal Bureau of Narcotics, attempted to serve a subpoena ad testificandum on one Jesse Coy, a Government informant in the investigation of the captioned case. Mr. Coy advised Agent Wood that he would not accept service of this

subpoena and he refused service of same. Attached is a handwritten statement of the aforesaid David Wood, which he tendered to me. It is, therefore, impractical to secure the presence of said witness by subpoena. Complainant is the Assistant United States Attorney for the Northern District of California in charge of prosecution of said case, on behalf of the plaintiff, United States.

DAVID P. BANCROFT,
Assistant U.S. Attorney.
Northern District of California.

Sworn to before me, and subscribed in my presence July 21, 1967.

RICHARD S. GOLDSMITH,
United States Commissioner.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

vs.

JESSE COY

WARRANT OF ARREST

To any Agent of the Federal Bureau of Narcotics:

You are hereby commanded to arrest Jesse Coy and bring him forthwith before the nearest available United States Commissioner to answer to an affidavit alleging complaint charging him with being a material witness in the trial of U.S. Winston Bryant McConney, No. 41110, N. Dist. of Calif., who has refused to appear at the trial of said case in response to a subpoena served upon him this date, and has stated he will depart the Northern District of California.

Date July 20, 1967.

CAMERON W. WOLFE,
United States Commissioner.

Received July 20, 1967, at Piedmont, Calif., and executed by arrest of Jesse Coy, Berkeley Calif., at Berkeley, Calif., on July 20, 1967.

DAVID S. WARD, *Narcotic Agent.*
Northern District of Calif.

APPENDIX G

UNITED STATES COMMISSIONER
NORTHERN DISTRICT OF CALIFORNIA

RECORD OF PROCEEDINGS—MISCELLANEOUS

Commissioner's Docket No. 1, Case No. G-13

UNITED STATES OF AMERICA

VS.

JESSE COY, a Material Witness in U. S.
VS. WINSTON BRYANT MCCONNEY.

AFFIDAVIT FOR MATERIAL WITNESS COMPLAINT

Before RICHARD S. GOLDSMITH, San Francisco, California

Date: July 21, 1967

Defendant appeared before me this date, affidavit having been filed on July 20, 1967 by David S. Wood, Narcotic Agent, Federal Bureau of Narcotics before Commissioner Cameron Wolfe, Oakland, California, based on a complaint charging the above-named defendant under Rule 46(b), Federal Rules of Criminal Procedure (Material Witness). Defendant advised os rights and provisions of Rule 46(b). Based on information furnished by the Bureau of Narcotics, and with the consent of the Government, defendant released on his own recognizance on condition that he appear before Berkeley Police once daily from Mon-

day, July 24, 1967 until trial. Defendant ordered to appear in District Court, San Francisco, California on July 26, 1967 at 9:30 A.M.

APPENDIX H

(Excerpt from Reporter's Transcript of July 24, 1967)

The Court: Mr. Coy, would you step forward, please. Step right up here.

The Clerk: This is Mr. Jesse Coy; isn't it?

Mr. Wells: Over here (indicating).

The Court: Mr. Coy, I have just declared a mistrial in this case and it will have to be set for trial again by the calendar judge and I am instructing you that since you are presently under a warrant as a material witness that you are under the order of the Court to be available as a witness and you are to be subject to the instructions of Mr. Bancroft, who is the attorney for the Government, who will advise you as to the trial date—next trial date of this case and that you will report to the office of the Berkeley Police Department at eight o'clock in the morning on the morning on which that case is set for trial to be available as a witness in this case.

Mr. Coy: Yes, sir.

The Court: I am doing this because I understand this meets with your convenience.

Mr. Coy: Yes; yes, sir.

The Court: All right. Then if that is the situation, that will be the order; and, Mr. Bancroft will notify you.

Mr. Bancroft: Certainly, your Honor.

The Court: And, you will then be available to be a witness in this case.

Mr. Coy: (Nodding affirmatively).

The Court: All right. Then, other than that, I will excuse you then. Then you can go about your business.

Mr. Coy: Yes, sir; thank you.

Mr. Bancroft: Thank you, your Honor.

(At which time there was discussion between Court and Counsel as to bail, exhibits and instructions; after which time, the Court adjourned the proceedings.)

State of California,
County of Marin, ss.

I, Theordore Saiki, hereby certify that I was the pro tem reporter in the United States District Court on July 24, 1967, in the case of USA vs. Winston Bryant McConney, No. Crm. 41110.

That I reported in stenotype all of the testimony taken and proceedings had on July 24, 1967 in the above-mentioned matter.

I further certify that the within and foregoing pages, numbered 1 to 2, inclusive, comprise a full, true and correct excerpt taken from said proceedings

and transcribed from said stenotype notes of the proceedings had as taken down in stenotype by me.

Dated: February 8, 1969.
At: San Rafael, California

Theodore Saiki, CSR

APPENDIX I

July 25, 1967 — TUESDAY

HON. OLIVER J. CARTER, U.S. DISTRICT JUDGE
L. B. PATTERSON, Deputy Clerk
GEORGE C. HEEG, Crier

TED. SAIKI for Rehrauer Court Reporter

CRIMINAL SECTION

41110—USA vs. McConney

The Deft. on bail with counsel and the parties herein as heretofore being present further jury trial was resumed.

The Court declared in this case a *mistrial* due to considerations in regard to confidential disclosure by a juror in this case, and the refusal of counsel to stipulate to proceeding with eleven jurors.

Ordered, case returned to the calendar to be set on July 26, 1967, by the Calendar Judge.

Ordered, Jesse Coy, a prospective witness in this case to return for testimony on the date case reset for trial, subject to the direction of Mr. David Bancroft, AUSA.

Ordered, Defendant to remain at large on the bail heretofore set.

Jury discharged from this case and until further notice from the Clerk at 11:00 A.M. July 25, 1967.

Ordered, juror #2, Mr. John L. Blalock, excused from all further jury service effective this date, and appropriate notice sent to him.

All exhibits (which are the same as those used in the trial of the co-defendant McAlee) retained in the custody of the Clerk, and are stored in the vault in the Clerk's Office.

APPENDIX J

STATUTES

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

§ 3149. RELEASE OF MATERIAL WITNESSES.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

§ 3150. PENALTIES FOR FAILURE TO APPEAR.

Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection

with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 40. PETITION FOR REHEARING.

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

RULE 46. BAIL.

(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 5517

WINSTON BRYANT MCCONNEY, PETITIONER

v.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, AND JUDGE HARRY PREGERSON

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 201

WINSTON BRYANT MCCONNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF MANDAMUS AND THE PETITION FOR A WRIT OF CERTIORARI

After a jury trial in the United States District Court for the Northern District of California, peti-

389-638—70

tioner was convicted of the transfer of heroin, not in pursuance of a written order form, in violation of 26 U.S.C. 4705(a). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. 35–41).

Petitioner was indicted for the above offense together with one McAlee, who was separately tried and convicted in January 1967. Petitioner, who had been a fugitive, was later apprehended and brought to trial in July 1967, but a mistrial was declared because of the disability of a juror. The retrial was set for October 9, 1967, but was twice continued and the trial finally began on October 23.

The evidence showed that Chesley, an agent of the Federal Bureau of Narcotics, and Coy, an informant, were in an apartment in Berkeley on October 14, 1966. McAlee came to the door of the room and said "We are ready, get the money." Chesley gave Coy $450, whereupon the two men followed McAlee across the hall to the open door of a bathroom. Chesley testified that he could see McAlee and petitioner inside the bathroom. Petitioner said "There it is," indicating a powdery substance (later determined to be heroin) on a chair in the bathroom. Coy asked "Where?" and McAlee replied "Right there." Coy started to hand the money to McAlee but petitioner grabbed the money from him and counted it. Coy took the heroin and petitioner and McAlee left after petitioner told Coy he did not then wish to meet Coy's partner (Pet. 36–37).

At McAlee's trial in January 1967, Coy was a witness and corroborated agent Chesley's story. Apparently

believing that Coy would change his story, petitioner's counsel attempted to subpoena him to testify at petitioner's July trial, but Coy refused to accept the subpoena. The opinion below relates that when petitioner's counsel notified the prosecutor of this fact, by mutual agreement Coy was arrested on a warrant "and released on bail." Following the declaration of mistrial the court directed Coy to appear at the time the case was next set for trial. On October 2, 1967, Coy declared that he would present himself on October 9, the date fixed for trial. He failed to appear that day and a warrant for his arrest was issued. Successive continuances were granted to October 23, and on that day petitioner sought a further continuance to locate Coy, although no one present had any information as to Coy's whereabouts. The trial judge denied the continuance.

1. In his petition for mandamus, petitioner seeks rehearing of his appeal on the ground that the court of appeals erroneously stated in its opinion that Coy was released "on bail" pending petitioner's retrial when in fact Coy was released on his own personal recognizance. This error is insignificant and its correction would obviously not affect the court of appeal's decision.

2. In his petition for a writ of certiorari, petitioner argues that the trial court erred in denying a continuance. The court below properly held that this ruling was well within the discretion of the trial court (Pet. App. 38). Furthermore, the trial court attempted to mitigate the effect of Coy's absence by permitting

petitioner to introduce a tape recorded statement of Coy for purposes of impeaching Chesley's testimony that petitioner was in the bathroom during the illicit transaction. Petitioner's contention that the trial court committed reversible error in admitting further testimony by agent Chesley to impeach the tape recorded statement is fully discussed in the opinion below.

The opinion below also fully answers petitioner's arguments that the district court improperly admitted testimony of McAlee's statement to Coy and Chesley during the narcotics transaction that "We are ready, get the money."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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Supreme Court
OF THE
United States
OCTOBER TERM, 1970
Nos. 5317 Misc. and No. 201

Supreme Court, U
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WINSTON BRYANT MCCONNEY,
Petitioner,
vs.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, and JUDGE HARRY PREGERSON
Respondent.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WINSTON BRYANT MCCONNEY,
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF THE GRANTING OF THE PETITION FOR A WRIT OF MANDAMUS AND THE PETITION FOR A WRIT OF CERTIORARI

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Co-counsel for Petitioner

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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 5317, Misc.

WINSTON BRYANT McCONNEY,
Petitioner,

vs.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JUDGE OLIVER D. HAMLIN, JR.; JUDGE JAMES R. BROWNING, and JUDGE HARRY PREGERSON, (Sitting by Designation),
Respondents.

No. 201

WINSTON BRYANT McCONNEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND PETITION FOR A WRIT OF CERTIORARI

I

Respondent, by its reply memorandum, fails to grasp the unusual significance of this case and fails to

perceive the fundamental rights of criminal defendants which are now in jeopardy as a result of holdings below. In its briefest of memoranda, respondent fails to reply to or cite a single authority in opposition to those of petitioner.

In the instant case, this court has a most unique opportunity to reaffirm the basic principles of Federal criminal justice in a well defined setting, since this prosecution consisted of a single count of a violation of a United States Code wherein the prosecution systematically used hearsay testimony on which the jury must have relied and which was properly and timely objected to by defense trial counsel. The most basic fact of this case is that every item of hearsay was the out-of-court statement of the absent material defense witness, Jesse H. Coy, whose absence prompted defense counsel to twice move the trial court for a reasonable continuance in order to obtain his presence. This same Jesse H. Coy was an employee of respondent, a known and experienced informer whom the United States Attorney could have produced and was charged with the responsibility of producing for the trial.

Ever since the *Bruton* case was decided in 1968, (*Bruton* v. *United States*, 391 U. S. 123; 88 S. Ct. 1620; 20 L. Ed. 2d 476) there has been a steady erosion of the ruling of this court by the various circuits and constant attempts to narrow and diminish its force. The constitutional significance of the depriva-

tion of confrontation and of the right to cross-examine accusing witnesses is of immense national importance at this time and must be resolved. If this court fails to sieze this opportunity to lay down rules for the conduct of trials wherein conviction would be impossible without hearsay, this case can be cited in the future as supporting the proposition that hearsay informer-testimony can be the principal basis of a conviction. Such a proposition is most repugnant to recognized principles of a fair and orderly trial and to the Sixth Amendment guarantee of the right of a defendant to confront and cross-examine witnesses testifying against him. (*Bruton* v. *United States*, supra; *Barber* v. *Page*, 390 U.S. 719; 88 S. Ct. 1318; 20 L. Ed. 2d 255 [1968], *People* v. *Green*, 70 C. 2d 654; 75 Cal. Rptr. 782; 451 P. 2d 422. [1969]).

While admitting the presence of hearsay testimony, respondent urges that its prejudicial effect was eliminated by admonitions and instructions, notwithstanding the practical and legal impossibility of such an event. Neither the Court of Appeals nor respondent reply to petitioner's argument that prejudicial hearsay is not correctable, since, once heard, testimony cannot be erased from the minds and memory of the jurors. (*Bruton* v. *United States*, supra).

The court below, by affirming petitioner's conviction, is also now on record as approving the use of hearsay introduced under the co-conspirator rule, although almost devoid of the proof aliunde that is re-

quired. (*Glasser* v. *United States*, 315 U.S. 60 [1942]) The court further failed to consider the questionable constitutionality of this exception to the hearsay rule, (*Evans* v. *Dutton*, 400 F. 2d 826 [1968]) a matter of substantial national importance at this time since this court has noted probable jurisdiction for certiorari in *Evans*, supra.

In light of the unique interrelationship of the admission of hearsay testimony to the denial of a continuance to obtain the presence of the absent material defense witness whose out-of-court declarations constituted this hearsay and in light of the total dependence of the prosecution on hearsay testimony and the questionable validity of the co-conspirator hearsay exception, this court should now consider and rule upon the propriety of the use of hearsay in this case and upon the constitutionality of this exception.

II

Significantly, respondent admits the error of the United States Court of Appeals for the Ninth Circuit in mistakenly stating that the absent material witness, Jesse H. Coy, was free on bail and thus implying economic compulsion to return to court at the specified date. This admitted error is most significant to the Court of Appeals' holding that there was no abuse of discretion in the trial court's denial of a continuance to obtain the presence of said absent material defense witness. The fact that the witness was under no economic compulsion to appear at the trial is particularly

relevant in light of the conduct of the prosecution in failing to maintain contact with the absent witness although directed to do so by the trial court and thereafter opposing the motion for the continuance when the witness failed to appear. This error clearly tended to minimize consideration of the prosecution's affirmative role in failing to produce its employee, Jesse H. Coy, as reasonably expected by petitioner. After the defense had been forced to cause his arrest as a material witness following Coy's refusal to accept a subpoena, the absent witness was freed on his own recognizance and, notwithstanding the restrictive provisions of 18 USC §3149 and §3150, no precautions whatsoever were taken to assure the presence at trial of this absent material defense witness, although the trial judge specifically instructed him to remain ready to testify at the continued trial date and instructed the United States Attorney to maintain contact and provide the witness with the trial date. In addition to the foregoing, the processes to compel the attendance of the absent witness were totally within the exclusive control of the prosecution. The attention of the Court of Appeals was clearly diverted from the consideration of the cumulative effect of these events by its erroneous statement of the facts. Because of the impropriety of the prosecution's use of hearsay testimony, occasioned by its own negligence, and the trial court's unfortunate denial of a continuance, which denied to the petitioner his only opportunity to confront this accuser, which was overlooked by the Court

of Appeals because of its misstatement of the facts, this court should grant this petition for mandamus and order further review.

III

The respondent, in its memorandum in opposition, suggests that the grossly prejudicial effect to petitioner of the denial of a continuance to obtain the presence of the absent material defense witness, whose testimony was so basic to petitioner's defense below, was mitigated by permitting the introduction of a tape recorded statement of said absent material defense witness. This argument fails to consider the unresponsive nature of prior tape recordings and the true nature of the right of confrontation contained within the Sixth Amendment, which includes the right to cross-examine and to present demeanor evidence. (*Bruton* v. *United States*, supra; *Barber* v. *Page*, supra)

For the foregoing reasons, it is respectfully urged that this court grant mandamus or certiorari and for further review in this matter.

Respectfully submitted,

MARKELL BAER, ESQ.
Counsel for Petitioner

MURRAY B. PETERSEN, ESQ.
Co-counsel for Petitioner

PROOF OF SERVICE

I, Murray B. Petersen, co-counsel for petitioner in this Petition for Mandamus and/or Certiorari and counsel of record for petitioner in the United States Court of Appeals for the Ninth Circuit, and a member of the Bar of the Supreme Court of the State of California and of the United States Court of Appeals for the Ninth Circuit, hereby certify that I served two copies of the foregoing "Reply Memorandum in support of the granting of the petition for a Writ of Mandamus and the petition for a Writ of Certiorari" on each of the following named individuals by depositing the same in a United States mail box, with first class postage prepaid, this 2nd day of October, 1970, at Oakland, California, addressed as follows:

HON. ERWIN GRISWOLD
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

HON. OLIVER D. HAMLIN, JR.
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

HON. JAMES R. BROWNING
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

HON. HARRY PREGERSON
United States District Judge, Central District of California (sitting by designation), by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

JUDGES AND OFFICERS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, by mailing 10 copies addressed to William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

JAMES L. BROWNING
United States Attorney
450 Golden Gate Avenue
San Francisco, California 94102

MURRAY B. PETERSEN
Co-Counsel for Petitioner,
WINSTON BRYANT MCCONNEY

Subscribed and sworn to before me a Notary Public in and for the State of California, County of Alameda, this 2nd day of October, 1970.

C. JEAN JEFFRIES

Supreme Court
OF THE
United States
OCTOBER TERM, 1970
Nos. 5317 Misc. and No. 201

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

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PETITION FOR REHEARING

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No. 201

WINSTON BRYANT MCCONNEY, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING

The petitioner herein respectfully moves this court for an order (1) vacating its denial of the petitions for writs of mandamus and/or certiorari entered October 12, 1970, and (2) granting the petitions

conjunctively or in the alternative. As grounds for this motion, petitioner states the following:

I.

THE RESTORATION TO THE CALENDAR FOR REARGUMENT OF DUTTON v. EVANS, NO. 10, OCTOBER TERM, 1970.

On June 29, 1970, following the submission of petitioner's opening brief, this Court ordered the matter of *Dutton* v. *Evans*, 10, October Term, 1970, restored to calendar for reargument, 38 U.S. L.W. 3521. Reargument took place 13 October 1970, the day following this court's denial of the petitioner's petitions for mandamus and/or certiorari. Because of these time factors, petitioner was unable to include in his petition or reply memorandum the matter of the continued pendency of *Dutton*, supra.

In *Dutton* v. *Evans*, supra, there is now before this court the opportunity to rule upon the constitutionality of the co-conspirator exception to the hearsay rule, an issue which is a major portion of petitioner's applications on file in this court. The decision of this court in *Dutton*, is certain to affect each circuit and its impact felt in all the states. The ruling will affect posture of the petitioner's application for writs of mandamus and/or certiorari since the U.S. Court of Appeals for the Ninth Circuit, by affirming this petitioner's conviction, held impliedly that the confrontation clause of the Sixth Amendment of the United States Constitution was not violated by the frequent and continued

introduction of hearsay testimony notwithstanding the fact that the out-of-court declarant was petitioner's accuser. Because of these similarities and the importance of affording this petitioner the review he seeks in light of current decisions this request for rehearing should be granted and the instant case reviewed concurrent with *Dutton*, supra.

Review of petitioner's applications for writ of mandamus and/or certiorari is made especially important since petitioner was charged, tried and convicted in Federal Court. The constitutional issue is therefore unfettered by State Court rulings. The common denominator between *Dutton* and the instant case is the use of hearsay accuser testimony and the issue of the constitutionality of the co-conspirator exception to the hearsay rule, in light of the protection of the Sixth Amendment confrontation clause. It is clear that under the facts of both cases that literal confrontation did not occur. The question now becomes—Was there a rational substitute for literal confrontation which could be found, and did the situation require that something less than literal confrontation be accepted by the court?

In his Amicus Curiae Brief for the United States, in *Dutton* v. *Evans*, supra, Erwin N. Griswold, Solicitor General, accurately points out that, in order to be admissible at all, hearsay testimony, be it co-conspirator statements or otherwise, must contain the important factor of necessity, that is, the unavailability

of the out-of-court declarant. In addition thereto, there must be certain safeguards to assure the trustworthiness of the evidence such has been found in the availability of cross-examination at a prior trial of hearing. In the instant case these records were absent. The prosecutor controlled all means of producing the absent witness in court and failed to do so, and the absent material defense witness did not testify, nor did petitioner or his defense counsel have the opportunity to cross-examine him at any time, so far as the record reveals.

Additionally, the Solicitor General, in his Amicus Curiae Brief mentioned above, repeatedly recites the requirement of asbence of fault on the part of the Government, Brief p. 18, wherein he states:

> "the prosecution should be required to show no more than that, through no fault of its own, an important declarant is not available to testify."

In the instant case, the prosecutor was not free of fault.

The prosecutor was involved in the witness' absence by virtue of the District Court's order and by virtue of being totally in control of the only procedures available to secure the presence of the witness. Having failed to accomplish the mechanics of assuring the presence of the absent witness, the prosecutor in the instant case clearly involved the United States in the

cause of the absent witness' unavailability and was therefore primarily responsible for the absence of the witness. (Petitioner's Petition, pp. 45-58.)

This Court will now, in ruling on *Dutton* v. *Evans*, supra, decide if fault on the part of the prosecution will nullify the applicability of the co-conspirator rule. This is a crucial issue in the instant case and petitioner should be permitted review in light of this pending decision. Accordingly, this Court should grant this petition for rehearing and retain this case for review and decision simultaneous with *Dutton*.

II.

THE GROWING CONFLICT BETWEEN THE CIRCUITS ON THE APPLICATION OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE.

In *Evans* v. *Dutton*, 400 Fed.2d, 826, 1968 case in United States Court of Appeals for the Fifth Circuit reversed the decision of the Georgia Supreme Court. *Evans* v. *State*, 222 Georgia 392, 150 S.E.2d, 240 (1960), and in doing so held that:

> "If an accused is to be deprived of the right to confront and to be confronted by the witnesses against him, there must be salient and cogent reasons for the deprivation. A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact."

In the instant case, the U.S. Court of Appeals for the Ninth Circuit ruled that hearsay testimony purportedly introduced under the co-conspirator exception to the hearsay rule was not antagonistic to the constitutional guarantees of confrontation, relying on its own decision in *Carbo* v. *U.S.*, 314 Fed.2d, 718 Ninth Circuit 1963. Certiorari denied, 377 U.S. 953 (1964). In *Carbo*, supra, the propriety of the use of such hearsay testimony was not examined with respect to its antagonism to the confrontation clause of the Sixth Amendment of the Constitution. The Ninth Circuit therefore by avoidance ruled contrary to the Fifth Circuit in *Evans* v. *Dutton*, supra, despite the fact that petitioner in his briefs to the U.S. Court of Appeals for the Ninth Circuit emphasized the constitutional issue contained in the co-conspirator exception to the hearsay rule.

In view of the current decisions of this Court in petitions now pending, which involve the evaluation of the constitutionality of hearsay testimony admitted under the co-conspirator exception to the hearsay rule, it is clear that the decision below should be reviewed since the latest interpretation of this Court was not considered by the U.S. Court of Appeals for the Ninth Circuit in making its decision in the instant case. The foregoing conflict should be set at rest by this Court.

The pending ruling of this Court in *Dutton* v. *Evans*, supra, will have an immense bearing on the resolution of these differences and petitioner herein

should be accorded the benefit of that decision and the resolutions of conflict between the Ninth and Fifth Circuits. This Court should recognize the similarity of issues between these cases and allow petitioner review of his case on the basis of the most current decision of this Court.

CONCLUSION

For the reasons set forth above, as well as those contained in petitions for writ of mandamus and/or certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petitions to correct the record on appeal and to review the judgment and opinions below in light of the corrected record.

Dated: November 18, 1970.

Respectfully submitted,

MARKELL C. BAER,

MURRAY B. PETERSEN,

Co-counsel for Petitioner

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

MARKELL C. BAER,

MURRAY B. PETERSEN,

Co-counsel for Petitioner

PROOF OF SERVICE

I, Murray B. Petersen, co-counsel for petitioner in this Petition for Mandamus and/or Certiorari and counsel of record for petitioner in the United States Court of Appeals for the Ninth Circuit, and a member of the Bar of the Supreme Court of the State of California and of the United States Court of Appeals for the Ninth Circuit, hereby certify that I served two copies of the foregoing "Petition for Rehearing" on each of the following named individuals by depositing the same in a United States mail box, with first class postage prepaid, this 18th day of November, 1970, at Oakland, California, addressed as follows:

HON. ERWIN GRISWOLD
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

HON. OLIVER D. HAMLIN, JR.
Judge of the United States Court of Appeals for the Ninth Circuit, by mailing said copies c/o William B. Luck, Clerk of the United States Court of Appeals for the Ninth Circuit
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Subscribed and sworn to before me a Notary Public in and for the State of California, County of Alameda, this 18th day of November, 1970.

MARGARET R. HAUSKNECHT